In the United States

Circuit Court of Appeals

for the Ninth Circuit

LEROY POWERS (otherwise known as ROY POWERS),
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4047

BRIEF OF PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

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STATEMENT OF THE CASE.

Plaintiff in error, Leroy Powers, otherwise known as Roy Powers, was arrested and charged, together with Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter and John Woods, with conspiring to violate the National Prohibition Act, that is, the Act of Congress of October 28, 1919, and was also charged, with the other defendants hereinbefore named, with conspiring to violate the Act of Congress of March 3, 1917, known as the Reed "Bone Dry" Amendment. Both of these conspiracies were

charged by the same indictment, said indictment consisting of four counts, and, omitting the formal parts, being as follows:

COUNT I.

The Grand Jurors of the United States, chosen, selected and sworn in and for the Northern Division of the Eastern District of Washington, upon their oaths present:

That heretofore, to wit: on or about the first day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Le Roy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors

unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereinafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspirators" may hereafter appear); to devise and execute a scheme whereby they, the said conspirators, working in conjunction with each other, would procure and cause to be procured for their intended use intoxicating liquors of various varieties for the purpose of possessing the same for beverage purposes, as the said conspirators might deem fit and proper with the intention of selling, bartering, exchanging, giving away and furnishing; that is, the said conspirators conspired and agreed together to possess intoxicating liquors containing more than one-half of one per centum of alcohol by volume and the same being then and there fit for beverage purposes, within the State and Eastern District of Washington, without they or any one of them having first obtained a permit to so possess intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors aforesaid do further present and find:

That the said conspirators did on or about the 27th day of July, 1922, at Republic, Ferry County, in the Eastern District of Washington and within the jurisdiction of this court, renew and continue

the said conspiracy, and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement, it was furthermore a part of the said conspiracy that they would assist others who might be engaged in the illegal possession of intoxicating liquor, in violation of the National Prohibition Act, and that they would provide a safe place for the temporary storing, keeping and concealment of intoxicating liquors that was owned and possessed by themselves or other persons to the Grand Jurors unknown.

And the Grand Jurors aforesaid do further find and present:

That the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact place being to the Grand Jurors unknown), and that it was furthermore a part of the said scheme that the conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire,

confederate and agree together to commit the acts hereafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 26th day of July, 1922, in Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully keep and conceal about twenty (20) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes, said intoxicating liquor being the property of certain persons named Joseph H. Frankel and Henry Dapper.

II.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and East-

ern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully steal from Joseph H. Frankel and Henry Dapper about twenty (20) cases of intoxicating liquor (the amount of which is to the Grand Jurors unknown), said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 27th day of July, 1922, at Republic, Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully possess about twenty (20) cases of intoxicating liquor (the exact amount of which is to the Grand Jurors unknown), said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of October 28, 1919, known as the National Prohibition Act; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other person to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspirators" may hereafter appear), that they, the said conspirators, working in conjunction with each other would aid, abet and counsel certain persons who were engaged in the unlawful possession and transportation of liquor

from the Dominion of Canada into the United States of America, and particularly in Ferry County in the Eastern District of Washington and within the jurisdiction of this court; it was a part of the said unlawful and felonious conspiracy so entered into by the said conspirators that they would become acquainted with persons engaged in the unlawful liquor traffic and commonly known as or termed "bootleggers" and offer to aid and assist them and guarantee them protection while in transit through the said County of Ferry, in the State of Washington; that they, the said conspirators, would furnish automobiles to transport the liquor from a point near the American line to and into the Town of Republic, and that some of the said conspirators would accompany the person or persons in the bootlegging business so as to afford them proper security and protection in their unlawful business; that they would collect from the various bootleggers sums of money for such service as they would render in assisting them in the actual transportation of intoxicating liquor within the state and Eastern District of Washington without they or any one of them having first obtained a permit to transport intoxicating liquors, as is required by law to be obtained.

And the Grand Jurors do further find and present:

That the said conspirators did on or about the 22d day of May, 1922, in Ferry County, in the Eastern District of Washington and within the jurisdiction of this court, renew and continue the said conspiracy and that in pursuance of the said unlawful and felonious conspiracy, combination, confederation and agreement it was further more a part of the said conspiracy that they would assist, aid and abet certain persons engaged in the illegal transportation of intoxicating liquors, containing more than one-half of one per centum of alcohol by volume, being then and there fit for beverage purposes, in violation of the National Prohibition Act.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the

Grand Jurors unknown did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, that on or about the date hereinafter designated, in Ferry County, within the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully perform and do the following acts:

I.

That on or about the 24th day of May, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully assist, aid and abet in the transportation of about ten (10) cases of intoxicating liquor, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

II.

That on or about the 10th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet in the transportation of about fifteen (15) cases of whiskey, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line, in Ferry County, to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume and then and there being fit for beverage purposes.

III.

That on or about the 28th day of July, 1922, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet in the transportation of about twenty (20) cases of whiskey, the exact amount of which is to the Grand Jurors unknown, from a point near the Canadian line in Ferry County to and into the Town of Republic, the said intoxicating liquor then and there containing more than one-half of one per centum of alcohol by volume, and then and there being fit for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT III.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917 (39 Stats. 1069), known as the Reed "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the

said divers other persons, being hereafter in this indictment called "conspirators" and who are intended and referred to wherever the word "conspirators" may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the city of Portland, in the State of Oregon; it is furthermore a part of the said unlawful and felonious conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of the said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quantities of intoxicating liquor from the Town of Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, to and into the City of Portland, in the State and District of Oregon, via the Great Northern Railway Company and connecting railways, the said Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Oregon, and the

laws of the State of Oregon prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes; and the Grand Jurors do further find and present that the said conspirators did, on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State of Washington and within the jurisdiction of this court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one, and it was continued in existence, operation and execution from about the first day of May, 1921, until the 7th day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect

the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 25th day of May, 1922, at Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about ten (10) cases of Canadian whiskey, to and into the City of Portland, in the State and District of Oregon, via the Great Northern Railway Company and connecting railways, said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Oregon, and the laws of the State of Oregon prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

COUNT IV.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That heretofore, to wit: on or about the 1st day of May, 1921, the exact date being to the Grand Jurors unknown, in Ferry County, in the State and Eastern District of Washington, the exact place being to the Grand Jurors unknown, Cline Ledgerwood, Thomas Barker, J. Guy Dungan, Jesse B. Cooke (alias Dick Cook), R. F. Carpenter, Leroy Powers and John Woods, whose other or true names are to the Grand Jurors unknown, defendants herein, did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown to commit the acts and offenses and crimes by the laws of the United States, to wit: the Act of Congress of March 3, 1917 (39 Stats. 1069), known as the "Bone Dry" Amendment; that is to say, the defendants did then and there wilfully, unlawfully and feloniously conspire, confederate and agree together and with divers other persons to the Grand Jurors unknown (all of the said individuals, including the said defendants and the said divers other persons, being hereinafter in this indictment called "conspirators," and who are intended and referred to wherever the word "conspir-

ators" may hereafter appear), that they, the said conspirators, working in conjunction with each other, did aid, abet and counsel certain persons who were engaged in the unlawful transportation of liquor from the State of Washington into other states, and particularly into the town of Pocatello, in the State of Idaho; it is furthermore a part of the said unlawful and felonious conspiracy, so entered into by the said conspirators, that they would become acquainted with persons who were engaged in the unlawful transportation of intoxicating liquor and in pursuance of said unlawful conspiracy that they, the said conspirators, would aid and assist them in the transporting and in causing to be transported in interstate commerce quanities of intoxicating liquor from the town of Republic, in Ferry County, in the State and Eastern District of Washington, and within the jurisdiction of this court, to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and the said connecting railways then and there being engaged in interstate commerce by lines of railway in the States of Washington and Idaho, and the laws of the State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and the said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medical and

mechanical purposes, and the Grand Jurors do further find and present that the said conspirators did on or about the 10th day of July, 1922, at Republic, in Ferry County, in the State of Washington and within the jurisdiction of this Court, renew and continue the said conspiracy, and that the aforesaid wilful, unlawful and felonious conspiracy, combination and agreement, as aforesaid, was formed on or about the first day of May, 1921, in Ferry County, within the State and Eastern District of Washington (the exact time being to the Grand Jurors unknown); that it was a part of the said scheme that the said conspiracy was to be a continuing one and it was continued in existence, operation and execution from about the first day of May,1921, until the seventh day of August, 1922, and that at all times between the said dates the said defendants and the divers other persons to the Grand Jurors unknown, did continue to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the acts hereinafter set forth in detail, and that in pursuance of the said unlawful and felonious conspiracy, combination and agreement and to effect the object of the same, the said conspirators did wilfully and unlawfully perform and do the following act:

That on or about the 10th day of July, 1922, at

Republic, in Ferry County, in the State and Eastern District of Washington and within the jurisdiction of this court, the said conspirators did wilfully and unlawfully assist, aid and abet Joseph H. Frankel and Henry Dapper in transporting and causing to be transported in interstate commerce a quantity of intoxicating liquor, to wit: about fifteen (15) cases of Canadian whiskey to and into the town of Pocatello, in the State and District of Idaho, via the Great Northern Railway Company and connecting railways, said Great Northern and the said connecting railways then and there being engaged in interstate commerce by line of railway in the States of Washington and Idaho, and the laws of the State of Idaho prohibiting the manufacture and sale therein of intoxicating liquor for beverage purposes, and said intoxicating liquor not being transported, as aforesaid, for scientific, sacramental, medicinal and mechanical purposes, but was then and there fit for beverage purposes and contained more than one-half of one per centum of alcohol by volume, contrary to the form of the staute in such case made and provided and against the peace and dignity of the United States.

At the proper and appropriate time defendant LeRoy Powers, otherwise known as Roy Powers, did move the court for an order setting aside and quashing the indictment hereinbefore set forth on

the ground and for the reason that said indictment alleges separate, distinct, specific and disconnected offenses and did make an alternative motion that in the event said motion to quash the aforesaid motion be denied, that the court should enter an order requiring the plaintiffs to select as to whether the Government should proceed to try on Count I and II of said indictment or on Count III and IV of said indictment. Both of these motions were denied by the court and each of said rulings by the court were excepted by the plaintiff in error.

ASSIGNMENT OF ERRORS.

I.

That the court erred in refusing to quash the indictment in the above entitled cause as requuested by Leroy Powers, otherwise known as Roy Powers, in his motion for an order setting aside and quashing the said indictment upon the grounds and reasons stated in said motion.

II.

That the court erred in not granting an order requiring the plaintiff to elect as to whether the Government should proceed to trial upon Counts one and two of said indictment or upon Counts three and four of said indictment, as requested by said defendant in his motion now on file herein.

III.

That the court erred in overruling said defendant's motion for judgment of acquittal, notwithstanding the verdict upon the grounds and for the reasons stated in said motion, which is now on file herein.

IV.

That the court erred in not granting said defendant's motion in arrest of judgment upon the grounds and reasons stated in said motion to which reference is hereby made.

V.

That the court erred in refusing to grant a new trial to said defendant upon the grounds and reasons stated in said motion.

ARGUMENT.

We shall discuss all assignments of error (one to five) together, the reason being that it is the contention of plaintiff in error that a new trial should have been granted by the court to the plaintff in error because of error in law occurring at the trial and excepted to by said plaintiff in error, which error of law consisted in failing to either quash the indictment or in failing to grant an order requiring the Government to elect as to whether it would pro-

ceed to trial upon Counts I and II of said indictment or on Counts III and IV of said indictment.

Sec. 1024 Fed. Stat. Ann. (2nd Ed.) provides: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated." (Act of Feb. 26, 1853, Chap. 80, 10 Stat. L. 162.)

This is a case in which the charges arise out of an alleged conspiracy, first, to violate the National Prohibition Act and a conspiracy to violate the National Prohibition Act is charged in each of the counts numbered I and II of said indictment. Wrongfully and improperly joined with the two counts alleging the conspiracy to violate the National Prohibition Act are Counts III and IV of said indictment, which charge that the defendants did conspire to violate an Act of Congress of March 3, 1917, commonly known as the Reed "Bone Dry" Amendment. The principal question raised by this appeal is the question of whether or not there can be lawfully joined charges of a conspiracy to violate the National Pro-

hibition Act passed October 28, 1919, after its passage was made possible and constitutional by the 18th Amendment to the United States Constitution with a conspiracy to violate the Reed "Bone Dry" Amendment, otherwise known as the Act of Congress passed March 3, 1917, and being an Act of Congress which was consistent with the provisions of the United States Constitution prior to the passage of the 18th Amendment.

Obviously it cannot be seriously maintained that the several charges set forth in the various counts of the indictment are for the same act or transaction, because Counts I and II are explicitly charging a conspiracy to violate a law which could not exist until such time as the Constitution was amended, and Counts III and IV charge a conspiracy to violate a law which was passed by Congress in the exercise of its control over interstate commerce prior to the passage of the 18th Amendment.

The indictment nowhere alleges that the unlawful transaction complained of in Counts I, II, III and IV refer to the same act or transaction, or that they were acts or transactions connected together.

It has been held in *U. S. v. Scott*, 4 Biss. 29, 27 Fed. Cas. No. 16,241, that there cannot be a joinder of counts for conspiracy and murder, unless it appears upon the indictment that the counts refer to

"the same act or transaction," or that they all are "acts or transactions connected together."

The failure of the indictment to show on its face that the counts referred to the same act or transaction or that they were all acts or transactions connected together was reason for the court to have granted either defendant Powers' motion to quash the indictment or his alternative motion to compel the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of said indictment—unless it was shown that the acts or transactions complained of were of the class of crimes or offenses. So far as counsel for plaintiff in error are able to discover, the question of whether or not a conspiracy to violate a law which was constitutional before the passage of the 18th Amendment to the Constitution is the same class of crimes or offenses as is a conspiracy to violate a law which was made possible only by so drastic a step as an amendment to our National Constitution is a new one and as yet has not been decided by a court of appeals. In construing Sec. 1024, above cited, it was held in *Miller v. U. S.*, 38 App. Cas. (D. C.) 361, 40 L. R. A. (N. S.) 973 that the consolidation of indictments authorized by this section is only in cases where the offenses charged in the separate indictments might have been embraced in separate counts in one indictment.

It was held in *McElroy v. U. S.*, 164 U. S. 76, 41 U. S. (L. Ed.) 355, that where six persons were indicted for assault with intent to kill a certain person on April 16, 1894; also for assault with intent to kill another person on the same day; also for arson of the dwelling house of another person on May 1, 1894; and where three of the defendants were also indicted for the arson of the dwelling house of still another person on April 16, 1894, and the court ordered the four indictments consolidated for trial, that there was error in the order of consolidation, as the several charges in the four indictments were not against the same persons nor were they for the same act or transaction, nor for two or more acts or transactions connected together; they were substantive offenses separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence.

It was also held in *U. S. v. Cadwallader*, 59 Fed. 677, that where the defendant was charged with having at various dates embezzled, abstracted and wilfully misapplied the moneys and funds of the bank that in each of the counts there were also set out the particular facts constituting such embezzlement, abstraction, and wilful misapplication of the moneys, and a demurrer was interposed to the indictments for duplicity on the ground that they, and each of them,

charge three distinct charges under the statute, and that the demurrer should be, and the demurrer was sustained.

It is particularly important to bear in mind that though it may be wrongfully argued that all conspiracies are crimes of the same class, that such argument is sophistry.

The gist of the offense of conspiracy is not merely the agreement, but it is the agreement to do an act which is prohibited by law. Bearing in mind that there can be no statutory offenses of conspiracy to violate a law unless there be a law to be violated, it would logically follow that if laws had been violated, but not of the same nature or class, that counts charging such violations could not be properly joined under Sec. 1024.

Counsel for plaintiff in error believe that it would be conceded that a count charging a conspiracy to commit treason could not be properly joined with a count charging conspiracy to violate the Pure Food Laws, unless it appeared upon the face of the indictment that the counts referred to the same act or transaction and that they were all acts or transactions connected together. In this case there have been joined counts charging a conspiracy to violate the Reed "Bone Dry" Amendment, which was passed by Congress in 1917 in the exercise of its control

over interstate traffic with counts charging a conspiracy to violate the National Prohibition Law, which became effective and possible only by virtue of an amendment to the Constitution of the United States. In other words, Counts I and II of the indictment charge in effect that the defendant Powers, together with the other defendants, did agree to violate the National Prohibition Law, an act of such peculiar and unusual nature and so distinctive in its nature that it became necessary to amend the Constitution of the United States before Congress had power to pass the law which Counts I and II charge that the defendant Powers and other agreed to violate. With these Counts I and II were wrongfully joined with Counts III and IV, which charge that the defendant Powers and others did agree to violate a law known as the Reed "Bone Dry" Amendment which was passed by Congress prior to the 18th Amendment in the exercise of Congress' control over interstate commerce, a right which has long been conceded to Congress.

To counsel for plaintiff in error it appears that in the first two counts there were charged agreements to violate a separate and distinct law, and that the charge of conspiracy to violate the law can only be predicated upon agreements to violate laws, and that offenses which consist of agreements to

violate laws that are not of the same class are not offenses of the same class.

The counsel for plaintiff in error earnestly insist that the defendant Powers, having been tried on all four counts of the indictment, with the other defendants in the same cause, and having been found not guilty on three of said counts and guilty on one of said counts, was prejudiced by the refusal of the Honorable Trial Court to quash the indictment, because of the wrongful joinder of counts, or in failing to compel the Government to elect as to whether it would proceed to trial on Counts I and II or Counts III and IV of said indictment.

Respectfully submitted,

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